

January 31, 1961

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Mr. W. T. Mendenhall
State Entomologist
Arizona Commission of Agriculture
and Horticulture
Phoenix, Arizona

Dear Mr. Mendenhall:

In your letter dated January 19, 1961 you requested the following opinion: "In the event a Commissioner resigned during the time the legislature was not in session and the Governor made an appointment to fill the vacancy caused by the resignation, could the appointee qualify and serve without confirmation until the legislature met and had an opportunity to confirm the appointment?"

The Legislature in establishing the qualifications and terms of the Arizona Commission of Agriculture and Horticulture provided in §3-101 A.R.S. 1956 that: "Appointment in filling a vacancy caused other than by expiration of term shall be for the unexpired portion thereof."

Article 5 §8 of the Arizona Constitution establishes that:

"When an office shall, from any cause, become vacant, and no mode shall be provided by the Constitution or by law for filling such vacancy, the Governor shall have the power to fill such vacancy by appointment."

We notice that except for the above quoted provision in §3-101 A.R.S. 1956 there is no other provision for filling a vacancy in the Commission.

§38-291 A.R.S., 1956 defines the various circumstances under which a vacancy is caused and under sub-paragraph 3 "resignations and the lawful acceptance thereof," is declared to create a vacancy in office.

Mr. W, T. Mendenhall
January 31, 1961
Page Two

Therefore, if in the problem you have posed, the Commissioner has resigned and lawful acceptance of his resignation has been made, there is a vacancy in office.

In the case of McCall v. Cull, 51 Ariz. 237, the Court said:

"Ad interim appointments by the appointive power are lawful and the appointee upon his qualifications is entitled to the position of the office if it is vacant."

In this case an appointment was made to fill a vacancy created in March of 1933 and such appointment by the Governor was never confirmed by the Senate. In August 1937 under a new administration the Governor attempted to fill the office by new appointment, which new appointment was not approved by the Senate. The Court held that the 1933 ad interim appointment, although never confirmed by the Senate, was a lawful appointment.

It is therefore our opinion that in the event a Commissioner resigns during the time the Legislature is not in session, the Governor may make an appointment to fill the vacancy caused by the resignation and such appointment need not be made with the advice and consent of the Senate.

Yours very truly,

ROBERT W. PICKRELL
The Attorney General

DARRELL SMITH
Assistant Attorney General

DS:vbk